Lenz & Riecker *and* Local 31, Graphic Communications International Union. Case 22–CA–24921

September 12, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

On February 14, 2003, Administrative Law Judge Eleanor MacDonald issued the attached decision. The Respondent filed exceptions with supporting arguments. Neither the General Counsel nor the Union filed a brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.[1]

I.

The Respondent, Lenz & Riecker, is a commercial book and financial printer. It had facilities in Totowa, New Jersey (the Clarkwood facility, involved here), Albany, New York, and Pennsylvania. The Charging Party, Local 31, Graphic Communications International Union (the Union), was the exclusive bargaining representative of a unit of the Respondent's employees. Most recently, the parties had a collective-bargaining agreement for the period October 1, 1999, to September 30, 2004.

On June 18, 1997, the Respondent and the Union entered into a "Letter of Agreement" that provided that the parties:

> Recognize that the Employer is engaged in a highly competitive business and that it has lost major customers in recent years. The Union recognizes that for a number of years the Employer has subcontracted work and has transferred work to its related companies . . . and that in keeping with the need for managerial flexibility it recognizes that this conduct was and is proper and shall continue to be permitted. The Employer recognizes in light of the above that some protection is warranted against *the lose* [sic] *of permanent jobs as a primary and direct result of subcontracting or transfer of work* . . . .
>
> The parties . . . agree that the Employer shall have the right to:
>
> (a) subcontract work,
>
> (b) transfer work or relocate work to facilities which it may acquire, or to its related companies, provided that in the event that as a primary and direct result of subcontracting and/or transfer of jobs traditionally done by the Employer at Clarkwood to its related companies, there are permanent layoffs, sixty-five percent (65%) of the number of jobs in the bargaining unit as of the date of this Letter of Agreement shall be preserved from *permanent layoffs which are the primary and direct result of such subcontracting or transfer*.
>
> (c) transfer or relocate equipment.
>
> (d) sell its assets or operations.
>
> (e) discontinue or eliminate its operations. [Emphasis added.]

Because of a continuing decline in the Respondent's financial health, in the spring of 2001, the Respondent began looking for a buyer for its business. In March,[2] the Respondent stopped paying contractual benefits for bargaining unit members. In May and June, the Respondent laid off a substantial number of employees. By July, the Respondent's condition had deteriorated to the point that its management had determined that it could not continue. On July 13, the Respondent's management called a meeting of the Respondent's creditors to discuss its plan to sell the Company as a going concern. The Company reported to its creditors, including the Union, that it did not intend to shut down immediately because it had a substantial amount of work in progress that it wanted to complete and it feared that it would not be able to collect its outstanding accounts receivable if it did not complete pending orders for its customers. It also expressed fear that its customers with pending orders would sue it if it did not complete their orders.

In August, the Respondent was able to stave off an involuntary bankruptcy petition filed by its creditors by securing debtor-in-possession financing from its principal lender, GE Capital Corp. (GECC). GECC provided the financing for a term of 30 days so that the Respondent could find a buyer for the going concern. On the basis of that financing, the bankruptcy court approved the Respondent's Chapter 11 petition.

During the 30-day period prescribed by the financing agreement and the bankruptcy court, the Respondent was unable to find a buyer for the Company. On September

[1] In the absence of exceptions, we adopt the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) of the Act by contacting bargaining unit members directly and offering them temporary employment after October 5, 2001.

[2] All dates are in 2001.

26, the Respondent informed its employees that it was going to close the Totowa plant on October 5 and would begin laying off employees on September 28. On September 27, the Respondent conveyed the same information to the Union and offered to bargain over the effects of its decision to liquidate. On September 28, the Respondent and GECC reached agreement on additional funding to allow Respondent to wind down its business. The financing included funding for payroll only until October 5. By October 5, the Respondent had laid off all but two or three employees.

On October 1, Respondent subcontracted with Interstate Litho Corporation (Interstate) to complete the Respondent's outstanding work. Pursuant to the subcontract, Interstate was to perform work previously done by bargaining unit members. Interstate continued to do work pursuant to the subcontract until sometime in November.

II.

The complaint alleged that the Respondent violated Section 8(a)(5) and (1) of the Act by laying off employees in September 2001 and then subcontracting unit work without prior notice to or an opportunity for bargaining with the Union.

The judge found the violations as alleged. She agreed with the General Counsel that the Respondent had an obligation to give notice to, and to bargain with, the Union over its decision to subcontract bargaining unit work. The judge rejected the Respondent's argument that the terms of its GECC financing and the strictures of its bankruptcy proceeding made it impossible for it to have paid bargaining unit members to do the work that it subcontracted to Interstate.

The judge relied upon two factors to support her conclusion that the Respondent failed to prove that it would have been impossible to retain bargaining unit members to do the subcontracted work. First, she concluded that the Respondent's ability to pay several bargaining unit members to do specialty work in October demonstrated the absence of an absolute prohibition on employing bargaining unit members after September. Second, she pointed to the Respondent's post hoc request to the bankruptcy court for approval of its Interstate subcontract as evidence that the court's preapproval was not a necessary precondition for expenditures.

The judge also rejected the Respondent's argument that, because its decision to subcontract was based on economic exigencies, it was not a mandatory subject of bargaining. The judge found the case upon which the Respondent relied, *Dorsey Trailers, Inc. v. NLRB*, 134 F.3d 125 (3d Cir. 1998), distinguishable. She found that, in contrast to *Dorsey Trailers*, the evidence showed that the bargaining unit members could have done the subcontracted work and that the subcontracting had an adverse impact on the unit, in that the Respondent laid off bargaining unit members sooner than it would have, absent the subcontracting. Finally, the judge rejected the Respondent's contention that the 1997 Letter of Agreement privileged the subcontracting.

The Respondent excepts, arguing that the bankruptcy court order and the terms of its financing made it impossible for it to use its debtor-in-possession financing to pay bargaining unit members. Accordingly, the Respondent argues that it should be excused from the asserted obligation to bargain with the Union over its decision to subcontract. Because the subcontracting was an economic necessity, the Respondent further excepts to the judge's conclusion that its decision to subcontract was a mandatory subject of bargaining. The Respondent also excepts to the judge's finding that it was not privileged to subcontract pursuant to the 1997 Letter of Agreement. The Respondent argues that the letter constitutes an acknowledgement by the Union that subcontracting occurred in the normal course of the Respondent's business and that, as such, it did not violate the parties' collective-bargaining agreement. Finally, the Respondent argues that the subcontracting did not primarily and directly cause the layoffs—the decision to liquidate the business was the cause—and, therefore, paragraph (e) of the Letter of Agreement privileged the layoffs.

For the following reasons, we find merit in the Respondent's exceptions, reverse the judge, and dismiss the complaint allegations that the Respondent violated Section 8(a)(5) by subcontracting bargaining unit work and laying off the employees who would have performed the work otherwise.

III.

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representative of his employees . . . ." Section 8(d) defines collective bargaining to include "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, ..." An employer's decision to terminate its business is not a mandatory subject of bargaining. See *Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 263, 268, 274–275 (1965) ("an employer has the absolute right to terminate his entire business for any reason he pleases"). Accordingly, an employer has no duty to bargain over its decision to terminate its business. Nonetheless, an employer has a duty, upon request, to bargain about the effects of such a decision on employees, "since

jobs [are] inexorably eliminated" by the decision to close. *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 677 (1981). Accordingly, the employer must give the union adequate notice before implementation of such a decision and provide it with an opportunity to bargain as to the effects of the decision on employees. Id. at 681.

Here, the parties do not dispute that the Respondent's decision to terminate its business was not a mandatory subject of bargaining. Accordingly, the Respondent had no duty to bargain over its decision to wind down its operations at the end of September and ultimately to shutter the Totowa facility. The dispute here involves whether the Respondent failed in its bargaining obligation relating to its means of completing its pending orders, after it made the decision to liquidate its business.

We find that the Respondent had an "effects bargaining" obligation to provide the Union with an opportunity to bargain over how it was going to wind down its operations. The manner in which it was going to complete those orders pending at the time it decided to liquidate its business was part of the wind-down process. The Interstate subcontract and the layoff of those employees who would have done the bargaining unit work subcontracted to Interstate were effects of the Respondent's decision to terminate its business over which the Respondent was obligated to bargain. See *Bridon Cordage, Inc.*, 329 NLRB 258, 259 (1999) (how the employer implements a reduction in its production capacity is an effect of the decision to reduce operations and therefore is a mandatory subject of bargaining).

We further find, however, that the Respondent did not fail its obligation in this respect. When it decided to terminate operations at the Totowa plant, the Respondent notified the Union of its decision to liquidate and explicitly offered to bargain over the effects of this decision. Once an employer gives notice of its decision and affords a reasonable opportunity for bargaining, the union has an obligation to take advantage of the opportunity by requesting bargaining. Where the union does not do so, the Board will not find a failure-to-bargain violation. See *Associated Milk Producers*, 300 NLRB 561, 563 (1990).

Here, the Union waived its right to bargain over the effects of the Respondent's decision to terminate its business—including the Interstate subcontract and the September layoffs.[3] Its waiver can be discerned from its inaction at the time it received notice of the Respondent's decision, considered in light of the 1997 Letter of Agreement. When the Union received notice of the Respondent's decision and its offer to bargain over the effects of that decision, the Union did not respond. It failed to respond even though it knew, from its participation as a creditor in the Respondent's bankruptcy proceedings, that there were several pending orders that the Respondent intended to complete and that the Respondent's authorization to use its debtor-in-possession financing to fund its payroll would expire at the end of September. Armed with these facts, the Union knew or reasonably should have known that there were issues about the manner of the liquidation of the Respondent's operations that would affect its bargaining unit members.[4] Having failed to request bargaining about those issues, the Union cannot now complain of the Respondent's failure to fulfill its statutory obligation.[5]

The terms of the 1997 Letter of Agreement, in turn, presumably explain the Union's inaction. The 1997 Letter of Agreement specifically recognizes the Respondent's right to subcontract a portion of bargaining unit work. Indeed, the letter imposes a restriction only on subcontracting that primarily and directly causes the permanent layoff of more than 35 percent of the bargaining unit that existed as of the time of the letter. That is not the case here. The employees at issue here were laid off as a consequence of the Respondent's decision to terminate its business, not because of the Interstate subcontract. To the extent that some employees were laid off because of the subcontracting, the terms of the letter demonstrate that the Union anticipated that it would not bargain over the subcontracting of small amounts of bargaining unit work—such as was covered by the Interstate subcontract—that resulted in the layoff of a relatively small proportion of the historic bargaining unit—such as the layoffs at issue here.

[3] Thus, we do not dispute the judge's assertion that the Respondent failed to establish that it was impossible for it to bargain over the subcontracting. Because, however, the Union failed to request bargaining, the Respondent's ability to bargain is irrelevant.

[4] We disagree with the judge that the Respondent's failure to give notice specifically of the Interstate subcontract is sufficient to constitute a violation. As explained above, the subcontract was an effect of the decision to liquidate the business. There is no dispute that the Respondent offered to bargain over such effects.

[5] The Respondent made its offer to engage in effects bargaining on September 27 and entered into its subcontract with Interstate on October 1. In some contexts, 4 days may not be sufficient to constitute a meaningful amount of time for effects bargaining, as required by *First National Maintenance*, 452 U.S. at 677–678 fn. 15, 681. Here, in light of the press of events in the bankruptcy court and the deadlines for completing the pending orders, we find that it was a reasonable amount of time.

Under these circumstances, we find that the General Counsel has not met his burden of demonstrating that the Respondent failed to fulfill its statutory bargaining obligation. Accordingly, we reverse the judge and dismiss the complaint allegation that the Respondent violated Section 8(a)(5) and (1) of the Act by subcontracting bargaining unit work and by laying off the employees who would have done the bargaining unit work had the Respondent not subcontracted it.

ORDER

The National Labor Relations Board orders that the Respondent, Lenz & Riecker, Totowa, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Dealing directly with bargaining unit employees and bypassing the Union.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facility in Totowa, New Jersey, copies of the attached notice "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 5, 2001.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges that the Respondent violated the Act other than found herein.

Dated, Washington, D.C. September 12, 2003

Wilma B. Liebman, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN BATTISTA, concurring.

I do not pass on the issue of whether the Respondent had a duty to bargain over its decision to subcontract because it was an effect of its decision to liquidate its business. Assuming arguendo that there was such a duty, I agree with the majority for the reasons set forth in its decision, that the Union failed to assert its right to bargain and, thus, no violation occurred. Further, to the extent that the decision to subcontract was not an "effect" of the decision to liquidate, I conclude that the Respondent had no obligation to bargain because the decision to subcontract was not a mandatory subject of bargaining. Decisions to subcontract are not always mandatory subjects of bargaining. In *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964) (*Fibreboard*), the Supreme Court found that subcontracting which constitutes "the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment" is a mandatory subject of bargaining. Id. at 213. Justice Powell explained in his concurring opinion in *Fibreboard*, however, that where the decision to subcontract was in essence an entrepreneurial decision, it would not be subject to compulsory collective bargaining:

> Nothing the Court holds today should be understood as imposing a duty to bargain collectively regarding such managerial decisions, which lie at the core of entrepreneurial control. Decisions concerning . . . the basic scope of the enterprise are not in themselves primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment. If, as I think clear, the purpose of Section 8(d) is to describe a limited area subject to the duty of collective bargaining, those management decisions which are fundamental to the basic direction of a corporate enterprise . . . should be excluded from that area.

Id. at 223. See also *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 688 (1981) (decision to terminate a portion of business is a core entrepreneurial decision not subject to compulsory bargaining).

The Respondent's decision here to subcontract was just such a core entrepreneurial decision and, therefore, was not a mandatory subject of bargaining. The record shows that the Respondent subcontracted with Interstate Litho Corporation (Interstate) to complete its pending orders as part of its decision to give up its efforts to sell the Company as a going concern, and instead to liquidate the Company. The Respondent intended to shut down, but it feared that if it did so immediately, it would not be able to complete customer work in progress. The result would be that the customers would not pay and might sue. As a stop-gap measure, the Respondent resorted to subcontracting for a period of about 1 month. Thus, the subcontracting was an entrepreneurial decision to delay the shutdown so as to avoid the economic consequences of an immediate shutdown.

This case is not a typical *Fibreboard* subcontracting case where, for labor cost reasons, the employer substitutes the subcontractor's employees for its own without altering its on-going operations. For example, in *Torrington Industries*, 307 NLRB 809 (1992), the employer's normal business—the production and sale of ready-mix concrete—continued unaltered by the employer's decision to subcontract truck driving services used to transport the concrete. In the instant case, the decision to subcontract the pending work was part of the Respondent's decision to radically change its overall operations—indeed to end them. To compel the Respondent to bargain over its decision to subcontract here would be to require the Respondent to cede control over the scope and direction of its business. The Act does not require such a relinquishment of control.

Therefore, I concur that the Respondent did not violate Section 8(a)(5) and (1) of the Act by subcontracting bargaining unit work and laying off bargaining unit members without first bargaining with the Union.

Dated, Washington, D.C. September 12, 2003

Robert J. Battista, Chairman

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT deal directly with you and bypass the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

LENZ & RIECKER

Dorothy Foley, Esq., for the General Counsel.
Jacqueline Greenberg, Esq. (Duane Morris, LLP), of Newark, New Jersey, for the Respondent.
Paul A. Montalbano, Esq. (Cohen, Leder, Montalbano & Grossman), of Kenilworth, New Jersey, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ELEANOR MACDONALD, Administrative Law Judge. This case was heard in Newark, New Jersey, on July 22, 2002. The complaint alleges that Respondent, in violation of Section 8(a)(1) and (5) of the Act, laid off its bargaining unit employees, subcontracted unit work without prior notice to the Union, and bypassed the Union and dealt directly with employees. The Respondent denies that it violated the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent in November 2002, I make the following

FINDINGS OF FACTS

I. JURISDICTION

The Respondent, a corporation, with a location in Totowa, New Jersey, engaged in the printing, binding, and distribution of print products, performed services valued in excess of $50,000 annually for customers located in States other than the State of New Jersey. I find that at all material times Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that Local 31, Graphic Communications International Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Respondent is a commercial book and financial printer. It specializes in printing one or two color reference or information documents that typically have a high page count and are time sensitive materials. The instant case concerns Respondent's Clarkwood location in Totowa, New Jersey. At the time of the material events Respondent also owned a plant in Pennsylvania and it leased a premises in Albany, New York.

The Union has been the designated exclusive collective-bargaining representative of a unit of Respondent's employees and it has been recognized by the Respondent in successive collective-bargaining agreements, the most recent of which has a term from October 1, 1999, to September 30, 2004. The appropriate unit is:

> All employees of the Employer operating or assisting on printing presses, including letterpress offset, (lithographic) and associated devices. Also, employees employed as offset cameramen, strippers and platemakers, all dark-room work, opaquing and dot etching, porters, utility men and stock handlers in the pressroom, except those employees employed in member shops who are under contract with another recognized union.

On June 18, 1997 the Respondent and the Union entered into a "Letter of Agreement."[1] The Letter Agreement provided that the parties:

> recognize that the Employer is engaged in a highly competitive business and that it has lost major customers in recent years. The Union recognizes that for a number of years the Employer has subcontracted work and has transferred work to its related companies . . . and that in keeping with the need for managerial flexibility it recognizes that this conduct was and is proper and shall continue to be permitted. The Employer recognizes in light of the above that some protection is warranted against the lose [sic] of permanent jobs as a primary and direct result of subcontracting or transfer of work. . . .
>
> The parties . . . agree that the Employer shall have the right to:
>
> (a) subcontract work, (b) transfer or relocate work to facilities which it may acquire, or to its related companies, provided that in the event that as a primary and direct result of subcontracting and/or transfer of jobs traditionally done by the Employer at Clarkwood to its related companies, there are permanent layoffs, sixty-five percent (65%) of the number of jobs in the bargaining unit as of the date of this Letter of Agreement shall be preserved from permanent layoffs which are the primary and direct result of such subcontracting or transfer.
>
> (c) transfer or relocate equipment . . . .
>
> (d) sell its assets or operations.
>
> (e) discontinue or eliminate its operations.

Steven Riecker was CEO and president of Respondent from March 2000 until May 2002.[2] He is a manager, supervisor and agent of Respondent within the meaning of the Act.

B. Bankruptcy Filings and Layoffs

Riecker testified that beginning in March 2001 Respondent had been trying to find a buyer for the business. By April and May 2001 the Respondent was incurring losses of $200,000 per week. By July 2001 the Respondent was out of cash and it was negotiating with two or three potential buyers with the object of selling the operating assets immediately and then disposing of the real estate. Respondent wanted to wrap up its operations and pay off its creditors. Management did not have the intention to continue to operate the Company. In July 2001, Respondent retained Duane Morris as counsel and on July 13 a creditors' meeting was held. Riecker testified that counsel for Local 31 attended the meeting. Respondent informed the creditors that it was trying to sell the corporation as a going concern in an orderly liquidation. Some of the creditors asked why Respondent did not shut down immediately. Respondent replied that there had been substantial layoffs in May and June and that the busy season of July, August, and September was starting. There was a lot of work in progress and Respondent needed employees to complete the jobs and enable Respondent to bill its customers for the finished products. Respondent had over $3 million in outstanding accounts receivable from those customers and it believed that if it did not complete all the work owing to those clients it would not be able to collect the amounts due. Respondent stressed that it wanted to sell the company as a going concern. At the meeting Riecker told counsel for the Union that he doubted that unit jobs would be preserved in Totowa.

On August 8, 2001, some of Respondent's creditors filed an involuntary Chapter 7 petition for bankruptcy which would have entailed an immediate shutdown of the plant. Respondent opposed this filing because it believed that it could obtain maximum value from the sale only if the business were still a going concern. On August 30, Respondent filed a voluntary bankruptcy petition under Chapter 11. Respondent hoped to convince its lender, GE Capital Corporation, the creditors'

[1] The letter identified the employer as "Clarkwood Division of Lenz & Riecker, Inc." in Totowa, New Jersey.

[2] Reicker had previously worked in various sales and customer service positions for Respondent from 1983 until 1992.

committee and the bankruptcy court to approve debtor-in-possession financing so that Respondent could pursue a sale.[3]

The employees walked off the job on August 30 because Respondent could not fund its payroll. On that day, Riecker addressed a memo to the employees informing them that Respondent was hoping to have enough time to sell the Company and that it hoped the bankruptcy court would approve the debtor-in-possession financing and thereby approve issuing paychecks to the employees. The memo said, "The bankruptcy court will evaluate offers to purchase all or parts of the company, and some may involve keeping all or some of it's [sic] manufacturing locations operating under new ownership." Riecker told the employees that everyone had to work hard to complete a large volume of work currently in the plant so that Respondent would retain its customers "to keep the company attractive to current or future buyers." He also pointed out that completion of work would help fund paychecks in the coming weeks.

On August 31, the court approved the Respondent's petition under Chapter 11. Riecker testified that pursuant to the terms of the debtor-in-possession financing approved by the court Respondent had 4 weeks to sell the Company or it would be shut down. GE Capital would not extend further credit after that time.

Riecker testified that potential buyers engaged in discussions with Respondent for deals including the good will and the equipment of Respondent or just the good will. However, Respondent was not successful in finding a buyer within the 4-week period.[4] The Respondent's losses continued and all the concerned parties wanted the plant to cease operating as soon as possible. On September 26, 2001, Riecker addressed a memo to all employees stating, in relevant part:

> We regret to inform you that due to the decision of a bankruptcy Judge, the Company's plant located… in Totowa, NJ will cease operation. The closure of the plant will occur on or about October 5, 2001 and separations of employment (Layoffs) will commence on September 28, 2001.

On September 27, Riecker sent a letter to Erik Johnson the president of Local 31 repeating the information that the plant would close on or about October 5 and that layoffs would occur beginning September 28. The letter stated:

> The Company offers to negotiate the effects of the closure on the employees your Union represents subject to the Bankruptcy proceeding. Please call Gerry Fields at Lenz & Riecker to schedule a date for such a meeting.

On September 28 some unit employees were given layoff letters. About 15 employees continued to work into the week ending October 5. By the second week of October 2001, the plant employed about two or three people, according to Riecker.

Barry Levinson was the chief financial officer of Respondent from April 2000 until December 31, 2001. Levinson was on the team that negotiated with GE Capital to obtain financing for the Company's operations. Levinson prepared a budget for submission to GE Capital. After GE Capital approved the budget submitted by Respondent the budget was submitted to the bankruptcy court for its approval. On August 30 or 31, 2001, Respondent and GE Capital agreed to an amendment of the original agreement with GE Capital that provided funding while Respondent sought to sell the assets. The bankruptcy court approved the financing on August 31. On September 28, 2001, Respondent and GE Capital agreed to another round of funding to wind down the business. As part of this agreement, Respondent prepared an operating budget for the month of October which included payroll for unit members only until October 5. Levinson stated that under the terms of the budget submitted for approval to the court Respondent could not pay unit employees' wages after October 5, 2001. Levinson testified that the lender and the creditors' committee had informed Respondent "as to what they would permit and I was instructed on how to prepare the budget so that it would be approved by the court." Levinson said that Respondent "had no choice" but to prepare the budget in accordance with the wishes of the lender and the creditors' committee.

Levinson testified that when he participated in negotiations with GE Capital and prepared the budget for the period after September 28 he did not include a line item to pay unit employees beyond October 5 because Respondent intended to subcontract the work. Levinson had known at the end of August that if Respondent did not find a buyer within the next 4 weeks it might have to subcontract uncompleted work.

Levinson testified in the bankruptcy court hearing on August 31 in order to gain the court's approval of financing while Respondent sought to sell the business. Levinson informed the court that Respondent intended to ship some equipment to its plant in Pennsylvania and operate it on a nonunion basis.

C. Subcontracting

On about October 1, 2001, the Respondent subcontracted bargaining unit work. The subcontracting took place pursuant to an "Agreement to Sub-Contract Printing Work" signed by Riecker and Henry Becker, the president of Interstate Litho Corporation. The Agreement recites the fact that Respondent is a debtor-in-possession. The Agreement provides that Interstate will fulfill the obligations of Respondent to its customers, using Respondent's logo and applicable service marks and trade marks, and that Interstate will invoice the completed and shipped work to Respondent on a COD basis. The Agreement states that it will become effective when so ordered by the bankruptcy court. Levinson testified that the work was sent to be completed at Interstate before Respondent applied to the court to approve the subcontracting arrangement on December 14, 2001. The Agreement was approved nunc pro tunc by the bankruptcy court.

Levinson, testified that Respondent had met with Henry Becker of Interstate in an effort to sell him the Company's assets including the real estate, machinery, and equipment. In fact, Becker bought some equipment from Respondent and he transferred the work to Pennsylvania. Levinson stated that

[3] GE Capital had entered into an agreement on July 31, 2000, to provide financing for Respondent.

[4] During the 4-week debtor-in-possession period the Company did not try to sell its real estate.

Respondent had hoped to preserve customers who would go with Becker if he were the buyer.

Riecker testified that the subcontracting was a necessary part of the bankruptcy proceedings. He stated that the work was part of the "wind down" of Respondent's operations. A number of jobs in the plant were substantially or nearly substantially completed and Respondent could not complete them. Interstate finished the work so that the jobs could be billed. According to Riecker, Interstate also did some jobs from start to finish. These were jobs that were in Respondent's "pipeline" and the customers could not quickly find another supplier. It made sense for Interstate to do the work and for Respondent to bill the customers. This gave the customers time to find another supplier. Riecker testified that Respondent supplied paper and ink to Interstate from its inventory; thus, Interstate did not bill Respondent for the paper and ink it used to complete the jobs. Riecker believed that the subcontracting continued until some time in November 2001. Riecker stated that unit employees could not complete the work because there was no cash to pay them and no approval from the bankruptcy court for the employees to work.

Levinson's testified that Respondent's October operating costs included $55,522 in purchases of paper, ink, and materials. He stated that the purchases were made for work that was completed in-house. However, Levinson submitted a document to the bankruptcy court that listed this amount under the costs of performing subcontracted work. Levinson also testified that Respondent could not have completed the subcontracted work in-house because it had no money to buy materials and to pay people.

Levinson testified that one reason to subcontract work to Interstate was to avoid potential lawsuits from Respondent's customers if it failed to complete work it had contracted to perform for them. There is no evidence that any such lawsuits were filed.

According to Levinson there were as many as a dozen jobs in the pipeline on September 28 when the first layoff notices went out. Some of the work was to be performed pursuant to contracts entered into as much as one year ago which required jobs to be done on a monthly basis.

Respondent had gross revenues of $354,077 for the month of October 2001 all of which it attributed to the subcontracting arrangement. Respondent paid Interstate $111,220 to perform the work but it lost money on the subcontracting arrangement due to its fixed operating and nonoperating expenses in October. Thus, it cost Respondent about $500,000 to obtain the $354,077 revenue for the month of October. Levinson testified that although Respondent lost money on the subcontracting he believed that if the work was not completed the Company would have been sued for millions by its disappointed customers. Levinson stated that a portion of the income attributed to subcontracting was in fact work performed by Respondent's employees. For example, one project which was billed at $150,000 was 98-percent complete but had to be bound. The subcontractor charged $9000 to bind the documents. On Respondent's income schedule the entire $150,000 is attributed to subcontracting work.

A few jobs completed by Respondent after the layoffs were very specialized and could not be handled by Interstate. Riecker knew that the work was offered to unit employees but he did not know whether they were paid according to the collective-bargaining agreement. Riecker stated that he had heard that Pressroom Manager Pat Conway offered such work to laid-off employees although he did not speak to Conway about this.[5] Riecker did not know whether Conway offered the work pursuant to the terms of the collective-bargaining agreement.

Robert Borgstedt testified that he was laid off from his job as a second-shift foreman on September 28 or 29, 2001, One or two weeks after his layoff Conway telephoned Borgstedt and asked him to come to the plant and run a job consisting of about 90,000 sheets for which he would be paid in cash. Conway did not tell Borgstedt whether the wages would conform to the collective-bargaining agreement. Borgstedt refused the job because he was afraid that he would have difficulty collecting his pay. Conway was not called to testify herein. Levinson testified that no one was ever paid cash by Respondent.

III. DISCUSSION AND CONCLUSIONS

A. Positions of the Parties

The General Counsel acknowledges that Respondent was in a precarious financial condition and that it had to close its doors. However, the General Counsel maintains that Respondent "should have bargained with the Union about the work remaining in the pipeline before it subcontracted it out." The General Counsel points out that Respondent supplied ink and paper to Interstate for the subcontracted work and that Respondent offered work to a unit member on a cash basis. The General Counsel concludes that Respondent, therefore, would have been able to complete the work in-house if it had scheduled the funds to pay unit employees when it submitted a budget to its lender and then the bankruptcy court. According to the General Counsel the collective-bargaining agreement specifically permits subcontracting only if a fixed percentage of unit jobs are retained. In the instant case, 65 percent of the employees were not retained and the Respondent was not privileged to contract out the unit work without bargaining with the Union. Finally, the General Counsel argues, Respondent was not faced with exigent circumstances such as would allow it to disregard its duty to bargain with the Union.

The Charging Party asserts that Respondent had decided to break up the Company and sell the assets with the good will. Respondent intended that the Pennsylvania facility would be sold and operated on a nonunion basis. According to the Charging Party Respondent planned to subcontract work to Interstate so that Interstate would have an ongoing concern and would pick up the work once the equipment was brought to Pennsylvania. Respondent's plan was to submit a budget to the bankruptcy court that supported a decision to subcontract; thus, the budget did not provide for the payment of unit employees past October 5. The Charging Party urges that Respondent could have submitted a budget to GE Capital and to the bankruptcy court that provided for the payment of wages to unit

[5] Levinson also identified Conway as a plant manager.

employees in order to finish the work that was in the pipeline rather than have the work contracted out to Interstate. The Charging Party points out that the machinery, paper, and ink required to finish the jobs was in the possession of Respondent. The Charging Party states that Respondent did not negotiate with the Union about the subcontracting. The collective-bargaining agreement says that the employer cannot subcontract work when the unit falls below 65 percent of its strength. By contracting out and failing to negotiate over this decision, Respondent violated the collective-bargaining contract. The contract had not been set aside by the bankruptcy court. It was Respondent's own actions that made it impossible to pay the unit employees past October 5.

The Respondent argues that the subcontracting to Interstate was permitted under the collective-bargaining agreement. Respondent relies on Riecker's testimony that in October 2001 there was not a loss of permanent jobs as a direct and primary result of subcontracting. Rather, the loss of permanent jobs was due to plant closing. The Respondent urges that the requirement of collective bargaining is subject to an exception in the case of impossibility. Respondent asserts that in this case no option existed except to lay off all the employees and subcontract work in progress. Respondent further asserts that the employer's reason for subcontracting centered around the scope and direction of the Company's future viability and was therefore solely an economic decision. Citing *Dorsey Trailers, Inc. v. NLRB*, 134 F.3d 125, 130 (3d Cir. 1998), Respondent concludes that the decision to subcontract was not subject to mandatory bargaining.

B. Conclusions

The testimony of the witnesses shows that most of the unit employees were laid off on September 28 or 29, but that a number worked in the plant until October 5. Further, unit employees were working past that day according to the testimony of Riecker who stated that by the second week of October the plant employed two or three people. Riecker also testified that the specialized jobs that could not be done by Interstate were offered to unit employees after the layoff. Riecker could not say whether the workers were paid according to the collective-bargaining agreement. Borgstedt testified that Conway called and offered him a job for cash 1 or 2 weeks after he was laid off. I find that the record conclusively establishes that Respondent continued to perform some work using unit employees after October 5. Although this issue was clearly raised during the presentation of the General Counsel's case the Respondent did not take the opportunity to introduce any evidence showing what mechanism was used to pay the employees. It is, therefore, a fair assumption that Respondent's lender and the bankruptcy court approved the payment of wages to unit members after October 5 and that approval was also obtained for the payment of utilities required to run the jobs.

Riecker testified that the subcontracting to Interstate continued until November. I note that the subcontracting agreement with Interstate was submitted to the bankruptcy court for approval on December 14, 2001, long after most of the work was done and delivered to customers. The subcontracting agreement provides that Interstate will do the work for Respondent on a COD basis. Therefore, funds were available for payment to Interstate long before the bankruptcy court approved the arrangement in December.

Levinson testified that when he negotiated with GE Capital and prepared the budget for the period after September 28 he knew that the Respondent intended to subcontract unit work and he did not include a line item to pay unit employees. In fact, Levinson testified, he had known at the end of August that if Respondent did not sell the business it might subcontract work. Thus, Respondent was aware before October 5 that it wished to contract out unit work.

The facts discussed above show that GE Capital funded the winding down of the business including work done by unit employees and by subcontractors after October 5. Although Respondent argues that it could not employ unit members after October 5 because it did not have approval from the lender or the bankruptcy court, this was apparently not the case. Indeed, the evidence shows that GE Capital did fund payment of unit members after October 5. And it was apparently not unlawful for Respondent to enter into the subcontracting agreement and make payments to Interstate long before the bankruptcy court had approved the action. Respondent has not shown why, if it could employ a few unit members to finish jobs that could not be done by Interstate after October 5, it could not have employed unit members to finish all the jobs. The evidence shows that Respondent furnished ink and paper to Interstate. Clearly, those materials could have been used in Respondent's own plant.

Respondent argues that its decision to layoff the remaining employees and subcontract unit work is an exception to the duty to bargain based on the doctrine of "impossibility." No witness provided testimony to show why Respondent could not have bargained with the Union concerning its intention to subcontract when it first formed that intention in August. I find that the argument of "impossibility" or "exigent circumstances" is not valid. No circumstances existed which would have prevented Respondent from informing and negotiating with the Union on the subject of laying off employees and contracting out the unit work. I contrast the facts in this case with the facts in cases where there was no money at all left to continue the employer's business and the business closed due to a rapidly developing catastrophe or emergency. *National Terminal Baking Co.*, 190 NLRB 465 (1971); *M & M Transportation Co.*, 239 NLRB 73, 75, (1978); *Raskin Packing Co.*, 246 NLRB 78 (1979). In this case, as shown above, Respondent had access to ink, paper and sufficient funds to pay both unit employees and a subcontractor after October 5. Respondent's argument based on *Dorsey Trailers, Inc. v. NLRB*, supra, is not convincing. In that decision, the court found that an employer subcontracted unit work in order to avoid losing sales of trucks that the unit employees could not have produced. The court said, "[N]or was there an adverse impact on the bargaining unit." The court held that the subcontracting was not a mandatory subject of bargaining. In the instant case, Respondent's own evidence shows that unit employees could have done the work in question and there unquestionably was an adverse impact in that unit employees were laid off sooner than they would have been in the absence of the subcontracting. It is not possible to decide

whether labor costs were a factor in Respondent's decision to subcontract because the record contains no evidence on this subject.

The language of the 1997 Letter of Agreement is designed to prohibit subcontracting where it would result in a loss of jobs to the extent that 65 percent of the work force would not be retained. There is no dispute that the Respondent, pursuant to the 1997 Agreement, had the right to sell its assets and operations and discontinue and eliminate its operations. Pursuant to that right most of the work force was laid off at the end of September. The only issue is the layoff of those few employees who might have been kept on to perform the work that Respondent gave to Interstate. Although these employees did not amount to 65 percent of the work force I find that the letter agreement did not waive their rights to employment. These employees might have been employed for a few weeks more finishing the jobs in the pipeline with the paper and ink on the premises. When those few employees who might have done the work that Respondent contracted out were laid off, their layoffs were the "direct and primary result of subcontracting" as specified in the Agreement. It is of no moment that their jobs might have lasted but a few weeks longer. Thus, the contract prohibited those layoffs which were the direct and primary result of the subcontract with Interstate. I find that the language of the 1997 Letter of Agreement did not privilege Respondent to layoff unit employees while it subcontracted unit work after October 5, 2001.

It is undisputed that Respondent did not give prior notice to the Union of its desire to contract out the work remaining after October 5 and did not bargain over the layoffs of the employees who might have performed that work. I find that Respondent violated Section 8(a)(1) and (5) of the Act.

Borgstedt's testimony that Manager Conway offered him unit work in October but stated that he would be paid cash was uncontradicted on the record. I find that Respondent offered Borgstedt work on terms not consistent with the collective-bargaining agreement. Respondent bypassed the Union and dealt directly with bargaining unit employees by offering them bargaining unit work under terms and conditions other than those described in the parties' collective-bargaining agreement. Respondent thus violated Section 8(a)(1) and (5) of the Act.

CONCLUSIONS OF LAW

1. At all material times Local 31, Graphic Communications International Union is the exclusive collective-bargaining representative of Respondent's employees in the following unit:

> All employees of the Employer operating or assisting on printing presses, including letterpress offset, (lithographic) and associated devices. Also, employees employed as offset cameramen, strippers and platemakers, all dark-room work, opaquing and dot etching, porters, utility men and stock handlers in the pressroom, except those employees employed in member shops who are under contract with another recognized union.

2. By laying off its employees and subcontracting unit work without notice to and bargaining with Local 31, Graphic Communications International Union, Respondent violated Section 8(a)(1) and (5) of the Act.

3. By dealing directly with bargaining unit employees and bypassing Local 31, Graphic Communications International Union, Respondent violated Section 8(a)(1) and (5) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having unlawfully laid off its employees and subcontracted unit work without notice to and bargaining with the Union, must be ordered to make whole those employees who would have performed the work but for Respondent's unfair labor practices, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

The Respondent, Lenz & Riecker, Totowa, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Laying off its employees and subcontracting unit work without notice to and bargaining with Local 31, Graphic Communications International Union.

(b) Dealing directly with bargaining unit employees and bypassing the Union.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole the employees who would have been assigned the unit work as described in the remedy section above for any loss of earnings and other benefits suffered as a result of the unlawful layoffs.

(b) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents all records relating to the contract with Interstate Litho Corporation, payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(c) Within 14 days after service by the Region, post at its facility in Totowa, New Jersey, copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judg-

by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 28, 2001.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. February 14, 2003

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT lay off our employees and subcontract unit work without notice to and bargaining with Local 31, Graphic Communications International Union for the following unit of employees:

> All employees of the Employer operating or assisting on printing presses, including letterpress offset, (lithographic) and associated devices. Also, employees employed as offset cameramen, strippers and platemakers, all dark-room work, opaquing and dot etching, porters, utility men and stock handlers in the pressroom, except those employees employed in member shops who are under contract with another recognized union.

WE WILL NOT bypass the Union and deal directly with our employees by offering them work under terms and conditions different from those in the collective-bargaining agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make those employees whole who would have been retained to perform work that was unlawfully subcontracted for any loss of earnings and other benefits, less any net interim earnings, plus interest.

LENZ & RIECKER

---

ment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."